IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

FIRST APPEAL NO. 408 OF 1987

Sanjay Harishchandra Vanarase)
residing at Shop No.7, Hosue)
No.21-33, Mugbhat Cross Lane,).. Appellant.
Bombay - 400 004. ...)..(Orig.Defendant)
(Obstructionist No.2)

Versus

Maratha Prakashan Pvt. Ltd.)
a Company incorporated under)
the Indian Companies Act,)
having their registered office)
at 16, Bhati Jiwanji Lane,).. Respondent.
Thakurdwar, Mumbai-400 002..)..(Orig.Plaintiff)

-: ALONG WITH :-

FIRST APPEAL NO. 409 OF 1987

Shankar Pilaji Kalate.. ... ... Appellant.
(Obstructionist No.1)

Versus

Maratha Prakashan Pvt. Ltd.)

a Company incorporated under)
the Indian Companies Act,)
having their registered office)
at 16, Bhati Jiwanji Lane,).. Respondent.
Thakurdwar, Mumbai-400 002..)

-: ALONG WITH :-

FIRST APPEAL NO. 328 OF 2003

1) Shankar Pilaji Kalate.)
2) Harishchandra Jagannath)
Vanarase (since deceased))
2a)Sanjay Harishchandra Vanarase)
Son, carrying on business at)
Shop No.7, House No.21/23,)
Mugbhat Cross Lane, Bombay-4.)... Appellants.
(Obst.Nos.1 & 2)

Versus

1) Haji Dawood Haji Elliase)
(Since deceased))
1A) Abdul Hamid Haji Dawood)
(deleted))
1B) Salimabai wife of Abdul)

Latif Dada, (deleted))

1a) Mohamed Hassan Hajat)

1b) Moriam Hassan Hajat)

Both having their address at)

C/o. Mr.Ismail Ibrahim Rawat)

per Prop.C/o. Faziz Taila,)

Near J.J.Hospital, Ibrahim)

Rahimtulla Road, Bombay -3.)

2) R. L. Belosay (since decd.))

2a)Mrs. Nilima Madhavrao Rane)

Rock Hill Complex, Narayan)

Dabholkar Road, Mumbai-6.)

2b)Shri Pralhad Ramchandra)

Belosay, Sadachar Sadan,)

16, Bhai Jiwanji Lane,)

Thakurdwar,Bombay - 2.)

2c)Shri Kamlakar Ramchandra)

Belosay, Deccan Apartments,)

"A" Building, Khar Danda,)

Badnra, Mumbai - 52.)

2d)Mrs. Uma Ajit Sawant,)

Boarding Road, At & Post :)

Ratnagiri.)

3) Maratha Prakashan Pvt. Ltd.)

a Company incorporated under)

the Indian Companies Act,)
having their registered office)
at 16, Bhati Jiwanji Lane,).. Respondents.
Thakurdwar, Mumbai-400 002..)

Mr. D. N. Hungud for Appellants.

Mr. H. S. Venegaokar for Respondents.

Mr. D.D.Belosay for Respondent Nos.2a to 2d in F.A. 328/2003.

CORAM : ANOOP V. MOHTA, J.

DATED : 16TH DECEMBER, 2005.

J U D G E M E N T :

All these three first appeals as arising out of a common judgment and decree passed in Short Causes Suit No. 3565 of 1965 by the Judge, City Civil Court, Bombay, whereby a suit filed by the original plaintiff / appellant in First Appeal No. 328 of 2003 and First Appeal No. 409 of 1987 and the respondent in First Appeal No. 408 of 1987 was dismissed. The First Appeal No. 408 of 1987 has been preferred by original defendant/ obstructionist No.2 against the original plaintiff in Short Cause Suit Nos. 1068 of 1966 and 1089 of 1966 in the City Civil Court at Bombay. One Maratha Prakashan Pvt. Ltd. filed suit against Sanjay Harishchandra Vanarase, who is plaintiff No.2

in Short Cause Suit No. 3565 of 1965. It be noted here that the respondents in First Appeal No. 408 of 1987 were the plaintiffs in Short Causes Suit Nos. 1088 of 1966 and 1089 of 1966. The fact and circumstances and parties are inter linked and connected in all these three suits and as consented, all the three appeals are being disposed of by this common judgment and order.

2. The common dates and events in all these three proceedings are as under:

The suit property is Shop No.7 situate at House NO. 21/33, Mughbhat Lane, Mumbai - 400 004. The appellant Sanjay Vanarase in First Appeal No. 408 of 1987 was the original defendant in Suit No. 1088 of 1966. In First Appeal No. 409 of 1987 Shankar who was defendant in Suit No. 1089 of 1966 filed by the respondent Maratha Prakashan Private Limited in these two appeals. Both these appellants are occupying the respective portion of Shop No.7 in question.

3. Original defendant Nos.1 and 2 / landlord / respondent Nos.1a and 1b in First Appeal No.328 of 2003, instituted R. A. E. Suit No. 4728 of 1961 in

the Small Causes Court at Mumbai against one Manohar Gangaram More, who was their tenant. On 22nd February, 1964 an exparte decree was obtained by the landlord against said Manohar. When the landlord tried to execute the said decree, appellants Shankar (Obstructionist No.1) and Sanjay (Obstructionist No.2) obstructed the said execution. The landlord, therefore, took out Obstructionist Notice bearing No. 255 of 1964. The appellants, therefore, engaged Mr. Belosay, advocate / respondent No.2 /original defendant No.2 in Suit No. 3565 of 1965, filed by Obstructionist Nos.1 and 2. The said advocate Mr. Belosay expired and therefore now his legal representatives respondent Nos. 2a to 2d are on the record.

4. The said Obstructionist Notice proceedings were adjourned from time to time and lastly it was fixed for hearing on 23rd February, 1965. The original plaintiffs Harishchandra Vanarase and Kolte, were not present on the date of hearing of the said notice. It may be noted here that the original Obstructionist Harishchandra Vanarase expired and therefore the said Sanjay Kolate has been contesting the proceedings. In the meantime, respondent No.3 in Suit No. 3565 of

1965 filed by the Obstructionist respondent in First Appeal No. 328 of 2003 and respondent in First Appeal Nos. 408 of 1987 and 409 of 1987 started claiming right in the suit premises and therefore filed third party application on 12th February, 1965 for joining them as party to the R. A. E. Suit No. 4728 of 1961. Therefore, all these proceedings were kept for hearing on 23rd February, 1965. On the same date the matter was called out and following order came to be passed.

> "By consent notice absolute against Obst. Nos.1 and 2. By consent, Obst. Nos.1 and 2 to vacate forthwith. No order as to costs. Notice against No.3 is made absolute. Obst No.3 to vacate forthwith.
>
> By consent notice discharged against Obst.No.4.
>
> By consent, plaintiff accepts Obst. No.4, as his tenant, in respect of the suit premises. No order as to costs."

5. As per the Obstructionists, they were never given

notice by the landlord of hearing of the said proceedings. Therefore, they were not present in Court on 23rd February,1965 when the above order was passed. The original Obstructionists Nos.1,2 and 3 were absent. Obstructionist No.4 i.e. respondent No.3 (Maratha Prakashan Pvt. Ltd.) herein, was present as observed in the above order.

6. As recorded, the learned Judge had disposed of the said proceedings. Both the Obstructionist Nos.1 and 2 on 6th March, 1965 approached their advocate Mr. R. L. Belosay (now deceased), who alleged to had gave evasive reply and asked them to approach the landlord. They came to know about the consent order passed on 23rd February, 1965. Therefore, they preferred the Short Cause Suit No. 3565 of 1965 in the City Civil Court at Bombay for declaration that the order dated 23rd February, 1965 was obtained by fraud and for various other reliefs. Respondent No.3 / Obstructionist No.4 i.e. Maratha Prakashan Pvt. Ltd. also instituted two suits in the City Civil Court at Bombay bearing S. C. Suit Nos. 1088 of 1966 and 1089 of 1966 against the Obstructionist Nos.1 and 2, the appellants in First Appeal No.408 of 1987 and First Appeal No. 409 of 1987 respectively. All these

suits were clubbed together. However, the suit filed by Obstructionist Nos.1 and 2 i.e. S. C. Suit No. 3565 of 1966 was dismissed for default and the suits filed by the said Maratha Prakashan Pvt. Ltd. were proceeded and decided and the decree for eviction was passed on 13th September, 1987 and therefore the appellants / Obstructionist Nos.1 and 2 preferred the present First Appeal Nos. 408 of 1987 and 409 of 1987.

7. In the meantime, the suit filed by the Obstructionists was restored to the file at the appellate stage by the Honourable High Court. Therefore it was proceeded and decided on 30th September, 2002. As the same was dismissed, the Obstructionist Nos.1 and 2 preferred the First appeal No. 328 of 2003.

8. Heard learned Counsel appearing for the parties. In so far as the First Appeal No. 328 of 2003 filed by Obstructionist Nos.1 and 2 is concerned, the learned trial court was right in dismissing the suit for declaration as sought. With the assistance of the learned advocate appearing for the parties, I have gone through the record and proceedings. The trial

court has rightly held that the court has jurisdiction to try the suit. The court further held that the plaintiff proved that Manohar was the tenant in respect of the suit premises. Plaintiff Nos.1 and 2 i.e. Obstructionist Nos.1 and 2 failed to prove that they were not present in the Court on 23rd February, 1965 for the reasons averred by them in para 3 of the plaint. Obstructionist Nos. 1 and 2 both failed to prove their own case as averred in the plaint. In the absence of any supporting evidence, the consent order passed by the learned trial Judge dated 23rd February, 1965 cannot be discarded. It is difficult to disbelieve the proceedings as recorded by the trial court while disposing of the Obstructionist notice by order dated 23rd February, 1965.

9. As contended that as per the practice in the Small Causes Court at Bombay, normally, the party appoints an advocate to present all applications and affidavits that may be necessary and also authorises the advocate to withdraw or compromise the said cause or to submit for arbitration any difference or dispute that would arise touching the said cause. The parties also authorise the advocate to withdraw the monies from the court and to receive monies from defendants outside

court and to instruct other legal practitioner and to do all other things which are necessary in the course of prosecution of the said cause. It also includes to execute the proceedings in satisfaction of the decree. This practice has been followed and admitted by all the Counsel appearing for the parties. Without going into that controversy in the present facts and circumstances of the case and as Obstructionist Nos.1 and 2 failed to prove their case by leading proper and sufficient evidence in support of their suit and the advocate, respondent No.2 Mr. Belosay against whom various allegations were made expired long back and as the original Obstructionist No.2 - Harishchandra Vanarase was also dead when the evidence was led by his heirs, appellant Shankar, therefore, on the date of order dated 23rd February, 1965 passed by the trial Court it was only original Obstructionist No.1 was involved and aware of the facts and not his heirs / legal representative Shankar Kolate. Therefore, it is difficult to accept the evidence of Shankar Kolate against the advocate Belosay and/or against the recorded proceedings of the court. The court proceedings as recorded, unless proved contrary by a substantial evidence and specially when the allegations of fraud and misrepresentation are against

the advocate, need to be accepted. In the present case, both the Obstructionists therefore failed to discharge their burden in support of the allegation of fraud and misrepresentation totally.

10. Even Obstructionist No.1's son Shankar was unable to justify his case as pleaded that his father was out of station on that day i.e. 23rd February, 1965. In view of the positive averment made in the plaint by the parties, a burden lies upon such party to prove the said averment. If party fail to prove such positive averment as raised, it is difficult to accept the case of such party specially in such cases of allegation of fraud and misrepresentation against the advocate. The declaration as sought against the order dated 23rd February, 1965 passed by the trial judge being obtained by fraud and misrepresentation and was null and void, need more cogent and clear evidence and material. Such suit for declaration that the order dated 23rd February, 1965 was null and void on the ground of fraud and misrepresentation therefore rightly dismissed by the learned trial Judge.

11. The learned Counsel appearing for the appellants / Obstructionist Nos.1 and 2 has strongly relied on

the judgment in the case of **Gurpeet Singh vs. Chatur Bhuj Goel** (AIR 1988 SC 400) and contended that in view of order 23 rule 3 of the Code of Civil Procedure the court must insist that compromise be reduced in writing and signed by the parties during hearing of suit or appeal. In the present case, therefore, as contended the said order dated 23rd February,1965 was not signed by the parties not binding to the Obstructionists. In the fact and circumstances of the case and as referred above, the consent order dated 23rd February, 1965 was as accepted by the parties, was duly passed by the trial Judge. There is no practice of getting signature of the parties on such proceedings in the trial court and specially in the Small Causes Court at Bombay and therefore in the absence of such practice and in absence of any contrary endorsement, such a proceeding as recorded and as reflected above whereby the court has disposed of those proceedings cannot be discarded and/or overlooked. The proceedings as recorded by the court is presumed to be correct and binding to the parties to the proceedings unless proved contrary by cogent evidence. The Apex Court decision in Gurpeet Singh **(supra)** is totally distinct and distinguishable in the fact and circumstances of the present case. The

principle to compromise such suit as contemplated under Order 23 rule 3 of the Code of Civil Procedure is very clear as referred above. But in the present case on fact itself, as the parties have failed to prove the alleged fraud and misrepresentation, I see there is no case made out by the appellant to interfere with the findings arrived at by the trial court.

12. The First Appeal No. 408 of 1987 and First Appeal No. 409 of 1987 filed by the original Obstructionists against the respondent, original Obstructionist No.4, Maratha Prakashan Private Limited for the above reason and in the facts and circumstances of the case also need to be dismissed. The Short Cause Suit Nos. 1088 of 1966 and 1089 of 1966 have been rightly decided by the trial court and granted decree for possession and mesne profits. In this proceedings also so far as Obstructionist - Harishchandra Vanarase is concerned, as he was dead, the appellant in First appeal No. 408 of 1987, Sanjay led the evidence. His evidence as observed above, in no way supports the case of personal knowledge and/or information of late Harishchandra Vanarase in respect of the events surrounding the compromise order dated

23rd February, 1965. As by the order dated 23rd February, 1965 the trial court has with the consent of the landlord, who never contested the proceedings at any point of time, accepted the Maratha Prakashan Private Limited, Obstructionist No.4, as tenant, as recorded therein, of the premises in question. In this background and for the above reason, there is no case made out by the appellant in these appeals to interfere with the finding arrived at by the trial court in both the suits filed against the respective Obstructionists. The trial court in those suits after framing the issues held that Obstructionist No.4, Maratha Prakashan Private Limited were the lawful sub-tenant of Keshav Savlaram prior to 23rd February, 1965 in respect of the suit premises and the same has been recorded whilst deciding the Obstructionist proceedings. As the Obstructionist Nos.1 and 2 failed to prove their case of fraud and misrepresentation, on the same footing the decrees have been passed in favour of Maratha Prakashan Private Limited. The Obstructionists therefore failed to prove their case and their right to occupy the premises in question. Therefore, there is no reason to reassess the reasoning given by the trial court while allowing suit for possession of Maratha Prakashan Private Limited.

The trial court has given reasoning based on the material as well as evidence led by the parties.

13. In view of the above reasoning given by the trial court in all the three matters, there is no case made out to interfere with the finding that the Obstructionists were allowed to occupy portion of the shop only to sleep in Suit No. 1088 of 1966 and allowed to sell the flowers in Suit No. 1089 of 1966 on payment of Rs.5/- per month respectively. There were no further rights created in favour of these Obstructionists. Due notices were issued of revoking the said leave and licence agreement. All allegations against late advocate Belosay as failed to be proved by Obstructionists, the consent order dated 23rd February, 1965 remained in tact and final. There is no case made out to interfere with that consent order. In this background, the Maratha Prakashan Private Limited, original plaintiff in these suits, have established that they were lawful sub-tenant of one Keshav Savlaram on 23rd February, 1965 of the suit premises. The Obstructionists failed to prove contrary. Therefore, their occupation now as observed by the court is of the trespasser. They also failed to prove their lawful occupation or exclusive

possession prior to the passing of the said consent order.

14. Taking all this into account, I see there is no reason to interfere with the findings arrived at by the trial court in all the three proceedings viz. S. C. Suit Nos. 1088 of 1966, 1089 of 1966 by order dated 28th/29th April, 1987 and in S. C. Suit No. 3565 of 1965 by order dated 30th September, 2002 passed by the City Civil Court at Bombay. The Judgments and orders of the trial court, therefore, are maintained. All these appeals are dismissed. There shall be no order as to costs.

15. The learned Counsel appearing for the appellants prayed for stay of this order for a period of eight weeks. Other side objected for the same. Considering the reasons given above, I am not inclined to stay the order. Therefore, prayer for stay is rejected.

Sd/-

(ANOOP V. MOHTA, J.)